IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

VICKI FOUNTAIN,	)	
	)	
Claimant Below-	)	
Appellant,	)	
	)	
v.	)	
	)	**C.A. No. S15A-07-005 MJB**
	)	
MCDONALD'S,	)	
	)	
Employer Below-	)	
Appellee.	)	

OPINION

Submitted: March 7, 2016
Decided: June 30, 2016

Upon Appellants' Appeal from the Industrial Accident Board's Decision, **AFFIRMED**.

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BRADY, J.

I. INTRODUCTION AND PROCEDURAL HISTORY

This is an appeal from a decision of the Industrial Accident Board ("Board") dated July 1, 2015.[1] On August 12, 2001, Victoria Fountain ("Appellant") injured her back when she slipped and fell on ice while working for McDonalds ("Appellee"). Following the August 12, 2001 accident, Appellant received a substantial amount of medical treatment, a large portion of which was paid for by Appellee's workers' compensation carrier.[2]

On October 12, 2005, Appellant filed a Petition to Determine Additional Compensation Due (the "2006 Petition"), seeking payment of outstanding medical expenses for treatment to her lower back provided by Dr. Ganesh R. Balu ("Dr. Balu") and Dr. Uday S. Uthaman ("Dr. Uthaman").[3] On August 1, 2006, the Board granted the 2006 Petition and awarded Appellant attorney and witness fees.[4]

On December 17, 2014, Appellant filed a Petition to Determine Additional Compensation Due (the "2014 Petition") against Appellee, seeking compensation for a surgery she had on September 25, 2014, and related medical treatment.[5] Appellant alleged that the surgery and related treatment, as well as work restrictions issued following the surgery, were reasonable, necessary, and causally related to her August 12, 2001 work accident.[6] A hearing on the merits took place before the Board on June 19, 2015.[7]

On July 1, 2015, the Board denied the 2014 Petition, holding that Appellant had failed to meet her burden to prove that her 2014 surgery and related treatment was necessary, reasonable,

[1] *See* Notice of Appeal-Industrial Accident Board, Item 1 (July 22, 2015).
[2] Stipulation of Facts, Ex. G to Appellant's Opening Br., Item 8 (Sept. 29, 2015).
[3] *See Fountain v. McDonalds*, IAB Hearing No. 1211735 (July 1, 2015).
[4] *Id.*
[5] *Id.*
[6] *Id.* at 2.
[7] *Id.*

and casually related to the August 12, 2001 work accident.[8] On July 22, 2015, Appellant filed a timely appeal of the Board's decision.[9] On September 3, 2015, Appellant filed her Opening Brief, and on October 26, 2015, Appellee filed an Answering Brief.[10] On November 9, 2015, Appellant filed a Reply Brief.[11] On March 7, 2016, the Court held oral arguments and advised the parties that the matter was taken under advisement.[12]

For the reasons outlined below, the Board's decision is **AFFIRMED.**

II. THE 2006 PETITION[13]

On March 27, 2006, the Board conducted a hearing on Appellant's Petition to Determine Additional Compensation Due. Dr. Balu, a board certified pain management and physical medicine and rehabilitation specialist, testified on behalf of Appellant. Dr. Balu summarized Appellant' relevant medical history, including that in the early 1970s, Appellant had surgery for developmental scoliosis. He noted Appellant had intermittent back pain over the years, but never to the extent that she had to go through a lot of treatment. Dr. Balu testified that Appellant "did very well for a long time." He concluded that Appellant was suffering from lumbar facet syndrome, lumbar radiculopathy, and post-traumatic spondylolisthesis. Dr. Balu characterized Appellant's back symptoms and treatment prior to the 2001 work accident as infrequent and intermittent, and opined that all three of Appellant's then present conditions were casually related to the August 2001 work accident.

Appellant testified at the hearing. Appellant stated that she had back pain prior to the 2001 work accident, that she had surgery for scoliosis when she was fifteen years old, and that

[8] *See id.*
[9] Appellant's Opening Br., Item 8 (Sept. 29, 2015).
[10] Appellee's Answering Br., Item 11 (Oct. 26, 2015).
[11] Appellant's Reply Br., Item 12 (Nov. 9, 2015).
[12] *See* Judicial Action Form, Item 14 (March 7, 2016).
[13] Unless otherwise noted, the following facts are taken from the Board's Opinion. *See Fountain v. McDonalds*, IAB Hearing No. 1211735 (Aug. 1, 2006).

her life was fairly normal after the surgery. Appellant acknowledged that in June of 2001 she saw Dr. Richard Sternberg ("Dr. Sternberg"), an orthopedic surgeon, and reported back pain at a level of 7 out of 10, that her pain had been getting worse, and that therapy had increased her pain. Appellant further testified that she saw Dr. Luis Cabral, ("Dr. Cabral") a rheumatologist, on August 9, 2001, and had an injection after reporting "killing type" pain.

Dr. David Sopa ("Dr. Sopa"), an orthopedic surgeon, testified on behalf of Appellee. Dr. Sopa examined Appellant on July 21, 2003 and February 15, 2006. Dr. Sopa opined that Appellant's treatment had been reasonable and necessary, but not all of the treatment was related to the August 2001 work accident. Specifically, Dr. Sopa opined that Appellant reached her Maximum Medical Improvement ("MMI") sometime before their July 2003 examination. Dr. Sopa further opined that any injections Appellant had relating to her facet arthropathy were not related to her work accident, but were instead related to her scoliosis and degenerative condition.

The Board was not convinced by Dr. Sopa's testimony. Rather, the Board summarized his opinion by stating, "[e]ssentially, Dr. Sopa opines that it is coincidental that the severity of [Appellant's] symptoms from her pre-existing degenerative condition became significantly worse in the years following her work accident." The Board held that Appellant's work accident aggravated or accelerated Appellant's condition. The Board further held that Appellant's August 12, 2001 work accident caused Appellant's lumbar facet syndrome, lumbar radiculopathy, and post-traumatic spondylolisthesis. The Board concluded that Appellant had met her burden of proving that the treatment to Appellant's back provided by Dr. Balu and Dr. Uthaman was reasonable, necessary and causally related to the August 12, 2001 work accident.

III. THE 2015 PETITION

On June 19, 2015, the Board conducted a hearing on Appellant's Petition to Determine Additional Compensation Due.[14] The issues before the Board were whether compensation for the September 25, 2014 surgery and related medical treatment was reasonable, necessary, and casually related to the August 12, 2001 work accident and whether the testimony of Dr. Stephens should be excluded.

A. Medical Treatment

The transcript of the deposition of Dr. Kennedy Yalamanchili ("Dr. Yalamanchili"), a neurosurgeon, was read into the record at the hearing.[15] Dr. Yalamanchili stated that because Appellant had failed to respond to conservative treatment she was a candidate for surgery, specifically an extension of her decompression and spinal fusion to incorporate two discs—L4-5 and L5-S1.[16] On September 25, 2014, Dr. Yalamanchili performed surgery and found substantial disc problems at both the L4-5 and L5-S1 levels including severe nerve impingement.[17] Dr. Yalamanchili testified that the surgery was reasonable, necessary, and causally related to the 2001 work accident.[18] Specifically, he stated that Appellant had a "diagnosis of the spondylolisthesis in 2002, which I'm proposing *probably* stemmed from this injury."[19] Dr. Yalamanchili further testified that "it's possible she may have required this surgery at some time in the future; maybe never would, I think, *probably* be the accurate

[14] *See* Hearing Tr., Ex. B to Appellant's Opening Br., Item 8 (Sept. 29, 2015).
[15] *See Id.*
[16] Hearing Tr., Ex. B to Appellant's Opening Br., Item 8, at B17-18 (Sept. 29, 2015).
[17] Dep. of Dr. Yalamanchili, Ex. D to Appellant's Opening Br., Item 8, at D8 (Sept. 29, 2015).
[18] *Id.* at D16.
[19] *Id.* at D30 (emphasis added).

answer."[20] Indeed, Dr. Yalamanchili concurred with Dr. Stephens that, "from a degenerative perspective, adjacent level disc problems can occur."[21]

Appellant testified at the hearing.[22] She indicated that prior to the work accident her pain levels were approximately a 7 or 8 out of 10 and that her pain levels at the time of the hearing were about 8 out of 10, but some days were better and some days were worse.[23]

The transcript of the testimony of Dr. David Stephens ("Dr. Stephens"), an orthopedic surgeon, was also read into the record at the hearing.[24] Dr. Stephens testified that he had reviewed medical records from Dr. Uthaman (from the Delaware Pain and Spine Center), Dr. Swaminathan, Dr. Antony (from the Delaware Open MRI), Nanticoke Health Services and Rehabilitation Services, Dr. Sternberg, Dr. Sopa, Dr. Cabral, Dr. Balu, and Dr. Mehdi.[25] Dr. Stephens was also provided an operative note by Dr. Yalamanchili.[26] Dr. Stephens opined that Appellant's lumbar complaints were not causally related to the work accident and that Appellant most likely would have needed the spinal fusion regardless of whether the work accident had occurred.[27] Dr. Stephens opined that had the 2014 surgery been causally related to the 2001 work accident, it would have occurred closer in time to the work accident and not thirteen years

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[20] *Id.* at D31 (emphasis added).

[21] *Id.*

> Q. Is it possible, without this work incident occurring, that Ms. Fountain would have ultimately needed this surgery to the L4-5 and L4-S1 due to the deterioration of her spine?
>
> A. So the answer is it is possible. You know, the truth is, from a degenerative perspective, adjacent level disc problems can occur. The question is: Did this injury progress or result in its own injury? And the answer is most likely, it's medically most probable that there was some clinical progression, radiographic progression that occurred during that time span that she describes this injury.
>
> So the answer is it's possible she may have required this surgery at some time in the future, probably not within the same time frame; maybe never would, I think, probably be the accurate answer.

Id. at D31.

[22] Test. of Appellant, Ex. B to Appellant's Opening Br., Item 8, at B33-49 (Sept. 29, 2015).

[23] *Id.* at B46-47.

[24] *See* Hearing Tr. Ex. B to Appellant's Opening Br., Item 8, at B49-61 (Sept. 29, 2015).

[25] Dep. of Dr. Stephens, Ex. E to Appellant's Opening Br., Item 8, at E5 (Sept. 29, 2015).

[26] *Id.*

[27] *Id.* at E16-17.

later.[28] Dr. Stephens further testified that there were convincing and consistent records of the problems Appellant was experiencing arising in patients who had "scoliosis surgery performed of this exact type at these exact levels" forty years prior.[29] Dr. Stephens noted that Appellant was evaluated in 2003 by Dr. Sopa who concluded that Appellant's lumber symptoms were most likely the result of arthritic changes, which occurred over time at L5-S1 following her thoracolumbar spine fusion.[30] Dr. Stephens concluded that the treatment Appellant received was reasonable and necessary as a follow up to her 2014 spinal surgery, but that the surgery was not causally related to the work accident, but, rather to arthritic changes, which were directly caused by the 1975 scoliosis surgery.[31]

The Board found that the evidence showed that Appellant suffered from the same lumbar complaints prior to the work accident that she did following the work accident, which supported Dr. Stephens' conclusion that Appellant's 2014 surgery and related treatment was causally related to her scoliosis surgery and degenerative arthritic changes and not to the work accident.[32] The Board noted that even Dr. Yalamanchili agreed that Appellant's pre-existing condition that led to her spinal deterioration could have necessitated the surgery.[33] The Board further noted that Dr. Sopa, in 2003, determined that Appellant's 2001 work accident had not produced any long term problems.[34] Based on this evidence, the Board found Dr. Stephens opinions to be more persuasive than Dr. Yalamanchili because "they correspond with the evidence and testimony more accurately."[35] As a result, the Board held that Appellant had failed to met her burden of proving that her 2014 surgery and related treatment was necessary, reasonable, and

[28] *Id.* at E18.
[29] *Id.* at E16-17.
[30] *Id.* at E9-10.
[31] *Id.* at E16-17.
[32] Board's Op., Ex. A to Notice of Appeal, Item 1, at A13 (July 22, 2015).
[33] *Id.*
[34] *Id.*
[35] *Id.*

causally related to the August 12, 2001 work accident.[36] The Board noted that most of the evidence suggested that the 2014 surgery and related treatment was causally related to the Appellant's scoliosis surgery and subsequent spinal deterioration.[37]

B. Motion to Strike

At the June 19, 2015 hearing, Appellant argued that the testimony of Dr. Stephens should be excluded and the Appellee should be precluded from presenting any defense at the hearing, because Appellee failed to timely file a Pre-Trial Memorandum and forward a copy to Appellant's counsel, and produced Dr. Stephens expert report past the deadline set by the Board.[38] The Board noted that Appellant received the defense's medical examination report on June 5, 2015, two days prior to the defense expert's deposition.[39] The Board further noted that Appellant received the Pre-Trial Memorandum on June 14, 2016, before Appellant's own medical expert's deposition, but after the deposition of the defense's medical expert.[40]

The Board held that because the expert report was produced within thirty days of the date of the hearing Appellee did not violate the Board's rules and the circumstances did not justify the exclusion of the doctor's testimony.[41] The Board noted that because the then pending petition did not involve a claim of permanent impairment, Board Rule 9 did not require that a medical report be produced.[42] The Board further found that, because the expert report was provided to Appellant twelve days prior to the deposition of Appellant's expert, and becuase Appellee's defense of lack of causal relationship was not unique or uncommon, there was no unfair surprise

[36] *Id.* at A14.
[37] *Id.*
[38] Hr'g Tr., Ex. B to Appellant's Opening Br., Item 8, at B4-6 (Sept. 29, 2015).
[39] Board's Op., Ex. A to Notice of Appeal, Item 1, at A9 (July 22, 2015).
[40] *Id.*
[41] *Id.* at A10.
[42] *Id.*

or prejudice that warranted the exclusion of Appellee's medical expert.[43] The Board denied Appellant's Motion to Strike Dr. Stephens' Testimony.[44]

IV. THE PARTIES CONTENTIONS

A. Appellant's Arguments

Appellant raises three issues on appeal: (1) the doctrine of collateral estoppel and *res judicata* precluded the Board from relying on Dr. Sopa's prior medical opinion; (2) the Board erred in permitting Appellee to present expert medical testimony and to present a defense to the petition; and (3) the Board's decision was not supported by substantial evidence.[45]

i. Collateral Estoppel and Res Judicata

Appellant argues that Dr. Stephens' opinions were in agreement with, and largely reliant on, Dr. Sopa's 2003 opinion that Appellant's lumbar symptoms were the result of arthritic changes unrelated to the work accident, as well as Dr. Sopa's 2006 opinion that the treatment from 2004 to 2006 for degenerative disk diseases and spondylolisthesis were unrelated to the work accident.[46] Appellant contends that the Board was presented with Dr. Sopa's opinion when it made its 2006 ruling and specifically rejected Dr. Sopa's opinion, finding that "the August 12, 2001 work accident caused [Appellant's] lumbar facet syndrome, lumbar radiculopathy and post-traumatic spondylolisthesis."[47] Appellant argues that the Board is bound by its prior factual determinations and that the doctrine of *res judicata* prevents the Board from reviewing the correctness of its prior ruling.[48] Appellant further contends that she is not asking the Court to find the doctrine of collateral estoppel prevents the Board from deciding two different issues—

[43] *Id.* at A10-11.
[44] *Id.* at A11.
[45] *See* Opening Br., Item 8 (Sept. 29, 2015).
[46] *Id.* at 13.
[47] *Id.* at 13-14.
[48] *Id.* at 14.

the compensability of medical expenses for treatment to Appellant's back provided by Dr. Balu and Dr. Uthaman (the issue at the 2006 hearing) and the compensability of the 2014 surgery (the issue at the 2015 hearing).[49] Instead, Appellant argues that collateral estoppel prevents the Board from reconsidering the findings of fact made by the Board in its 2006 decision.[50]

ii. Expert Testimony and Presentation of a Defense

Appellant notes that she received the defense's medical examination report on June 5, 2015, two business days prior to the defense expert's deposition, and received the Pre-Trial Memorandum on June 14, 2016, after the deposition of the defenses' medical expert but before the deposition of her medical expert.[51] Appellant argues that the late submission of the Pre-Trial Memoranda violated Board Rule 9, which states, in pertinent part, "[e]ither party may modify a Pre-Trial Memorandum at any time prior to thirty (30) days before the hearing. Amending the Pre-Trial Memorandum by written notice to the opposing party and the designated employee of the Department of Labor may be made in accord with this Rule . . ."[52]

Appellant argues that she was placed at a significant disadvantage in preparing and presenting her claims because she had no information as to what witnesses Appellee intended to call and what defenses those witnesses' testimony would support.[53] Specifically, Appellant contends that because she received the defenses' medical report two business days before the deposition of the expert, she was deprived of a sufficient opportunity to fully evaluate the report, to consult with her medical witness regarding the opinions, did not know what defense Appellee would present, and could not adequately prepare to defend the deposition.[54]

[49] Reply Br., Item 12, at 1-2 (Nov. 9, 2015).
[50] *Id.* at 2.
[51] Opening Br., Item 8, at 18 (Sept. 29, 2015).
[52] *Id.* at 17-18.
[53] *Id.* at 18.
[54] *Id.* at 18-19.

Appellant argues that the fact that there was no continuance requested is irrelevant because it was not Appellant's responsibility to cure procedural issues caused by Appellee.[55] Appellant further argues that the fact that the parties complied with a ruling that they submit a Stipulation of Facts immediately prior to the hearing is also irrelevant and does not excuse Appellee's failure to comply with Board Rule 9.[56]

iii. Substantial Evidence

Appellant argues that Dr. Stephens' testimony and conclusions lack the necessary foundation and therefore the Board's reliance on his testimony resulted in a decision that was not supported by substantial evidence.[57] Specifically, Appellant notes that Dr. Stephens conceded that he lacked a substantial amount of medical records in the case, having not received the family doctor or other providers' medical records.[58]

Appellant argues that Dr. Stephens' opinion was unsupported by the evidence presented at the hearing. Specifically, Appellant argues that Dr. Sopa's opinions should have been "strip[ped] away" from Dr. Stephens' opinions because the Board had rejected Dr. Sopa's opinion in its 2006 decision.[59] Appellant argues that Dr. Stephens' opinions have a lack of foundation and do not establish substantial evidence if Dr. Sopa's opinion is not considered.[60] Appellant contends that "Dr. Stephens' opinions rely almost entirely on the previously discredited opinions of Dr. Sopa."[61]

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[55] Reply Br., Item 12, at 6-7 (Nov. 9, 2015).
[56] *Id.* at 7-8.
[57] *Id.* at 21.
[58] *Id.* At Dr. Stephens' deposition Appellant questioned Dr. Stephens "about his lack of the records of Dr. Granada, Dr. Yalamancchili, Christiana Care Health Services, Delaware Spine Institute/Dr. Lieberman, Dr. Sopa's 2006 DME report, Dr. Jason Brokaw's 2007 DME report, Dr. Rosas, Dr. Quinn, Tidewater Physical Therapy and Dr. Somori." Reply Br., Item 12, at 9 (Nov. 9, 2015). Appellant further notes that this argument was presented to the Board during closing argument. *Id.*
[59] Reply Br., Item 12, at 8-11 (Nov. 9, 2015).
[60] *Id.* at 10.
[61] *Id.*

B. Appellee's Arguments

i. Collateral Estoppel and Res Judicata

Appellee argues that the Board's 2015 finding was based on different facts and was on a different issue than addressed in the Board's 2006 decision and therefore the doctrines of *res judicata* and collateral estoppel are not applicable.[62] Specifically, Appellee notes that the Board's 2006 opinion was for compensability of medical treatment by Dr. Balu and the Board's 2015 decision was to determine the compensability of a surgery by Dr. Yalamanchili.[63] Appellee further argues that the facts are different as emphasized by Appellant's inconsistent testimony at both hearings.[64]

ii. Expert Testimony and Presentation of a Defense

Appellee argues that because the claim was not for permanent impairment, the Board rules in general and Board Rule 9 specifically do not require production of a medical report and that the real issue is whether the late submission of Dr. Stephens' report and the Pre-Trial Memorandum constituted unfair surprise to Appellant.[65] Appellee further argues that there was no unfair surprise because Appellant had the report two business days before Dr. Stephens' deposition was taken and twelve days before the deposition of Appellant's expert.[66] Appellee contends that there was no surprise because lack of causal relationship is a common defense.[67] Appellee further notes that Appellant did not request a continuance of the hearing due to the

[62] Answering Br., Item 11, at 12 (Oct. 26, 2015).
[63] *Id.*
[64] *Id.* at 13-14. Specifically Appellee notes that in 2006 Appellant testified that prior to the work accident she was experiencing pain levels of 3 out of 10, but at the 2015 hearing she said they were at least a 7 or 8 out of 10. *Id.*
[65] Answering Br., Item 11, at 16 (Oct. 26, 2015).
[66] *Id.*
[67] *Id.* at 17.

timing of the receipt of the submissions and that Appellant's counsel is an experienced practitioner of Workers Compensation and was able to adequately cross-examine Dr. Stephens.[68]

iii. Substantial Evidence

Appellee argues that this Court cannot review the Board's credibility determination. Specifically, Appellee contends that under Delaware law when the Board finds one witness more credible than another no more clarification is needed.[69] Appellee argues that even if this Court can review the Board's finding, Appellant failed to argue below that Dr. Stephens' opinion lacked a proper foundation and such an argument was therefore waived by Appellant.[70] Appellee further argues that Appellant is impermissibly requesting the Court to evaluate the facts submitted at the hearing and ultimately conclude that Dr. Yalamanchili's opinion is more persuasive.

V. STANDARD OF REVIEW

The Court has a limited role when reviewing a decision by the Board. If the decision is supported by substantial evidence and free from legal error,[71] the decision will be affirmed.[72] Substantial evidence is evidence that a reasonable person might find adequate to support a conclusion.[73] The Board determines credibility, weighs evidence, and makes factual findings.[74] This Court does not sit as the trier of fact, nor should the Court substitute its judgment for that rendered by the Board.[75] The Court must affirm the decision of the Board even

[68] *Id.* at 17-18.
[69] *Id.* at 18-19 (citing *Arrants v. Home Depot*, 65 A.3d 601, 606 (Del. 2013) (citing *DiSabatino Bros., Inc. v. Wortman*, 453 A.2d 102, 106 (Del. 1982))).
[70] *Id.* at 19.
[71] *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960).
[72] *Sirkin and Levine v. Timmons*, 652 A.2d 1079 (Del. Super. Ct. 1994).
[73] *Oceanport Indus. Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994).
[74] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965).
[75] *Id.* at 66.

if the Court might have, in the first instance, reached the opposite conclusion.[76] The Board has the discretion to accept the testimony of one expert over that of another expert when evidence is in conflict and the opinion relied upon is supported by substantial evidence.[77] When reviewing an appeal from the Board, this Court must consider the record in a light most favorable to the party prevailing below.[78] When factual determinations are at issue, the Court must take due account of the experience and specialized competence of the Board and the purpose of the Worker's Compensation Act.[79] Questions of law are reviewed *de novo*.[80]

VI. ANALYSIS

A. Expert Testimony and Presentation of a Defense

"Delaware courts defer to an agency's interpretation of statutes it is empowered to enforce if such interpretation is not 'clearly erroneous.'"[81] The Court's review is limited to determine whether the agency "exercised its power arbitrarily or committed an error of law, or made findings of fact unsupportable by substantial evidence."[82] "The Board's rules of procedure are promulgated for the 'more efficient administration of justice.'"[83] Enforcement of the Board's rules "serves the interests of order and efficiency in Board proceedings as well as the prevention of unfair surprise."[84]

Appellant's argument that late production of Appellee's medical examination report violated Board Rule 9 is without merit. Board Rule 9(B)(5)(d) only requires a party to produce a

[76] *Brogan v. Value City Furniture*, 2002 WL 499721, at *2 (Del. Super. Ct. March 27, 2002).
[77] *Conley v. Capitol Homes, Inc.*, 2006 WL 2997535, at *5 (Del. Super. Ct. Aug. 31, 2006) (internal citations omitted).
[78] *General Motors Corp. v. Guy*, 1991 WL 190491 (Del. Super. Ct. Aug. 16, 1991) (internal citations omitted).
[79] *Mangle v. Grotto Pizza, Inc.*, 1997 WL 358671, at *4 (Del. Super. Ct. May 13, 1997).
[80] *Christiana Care Health Serv. v. Palomino*, 74 A.3d 627, 629 (Del. 2013).
[81] *Johnson*, 728 A.2d at 1188 (internal citations omitted).
[82] *Olney v. Cooch*, 425 A.2d 610, 613 (Del. 1981) (quoting *Kreshtool v. Delmarava Power and Light Co.*, 310 A.2d 649 (Del. Super. Ct. 1973)); *see also* 29 *Del. C.* § 10142(d).
[83] *Conley*, 2006 WL 2997535, at *5 (quoting *Cole v. Department of Corrections*, 1984 WL 547838 (Del. Super. Ct. Feb. 27, 1984)). *See also* 19 *Del. C.* § 2301A(i) ("[The Board's] rules shall be for the purpose of securing the just, speedy and inexpensive determination of every petition pursuant to Part II of this title.").
[84] *Id.* (citing *Haveg Industries, Inc. v. Humphrey*, 456 A.2d 1220, 1222 (Del. 1983)).

medical expert report when the claim is for compensation for permanent injuries under 19 *Del. C.* § 2326.[85] In the instant matter, Appellant seeks compensation for a surgery and related treatment, not for a permanent injury. Appellant's claim is not based on 19 *Del. C.* § 2326, and Board Rule 9(B)(5)(d) does not require Appellee to provide a medical report in their Pre-Trial Memorandum. No other Board rule requires disclosure of a medical report. The Board found the postponed production of the report did not violate Board Rule 9 because it was not a claim for permanent impairment and therefore did not necessarily justify the exclusion of Dr. Stephens' testimony. Based on a review of the Board's rules, the Court is satisfied that this finding was not clearly erroneous.

Appellant next argues that the Board's ruling with regard to the late production of the Pre-Trial Memorandum was reversible error. That claim is similarly without merit. The Delaware Supreme Court has emphasized that enforcement of the Board's rules serves the interests of order and efficiency in Board proceedings as well as the prevention of unfair surprise.[86]

The Board weighed the impact of the late submission of the Pre-Trial Memorandum on the parties' ability to have a fair hearing on the merits and on the Board's ability to make a just determination of the petition.[87] The Board noted that Appellant had a right to know what the opinion of Appellee's expert witness was in a timely fashion so that she could prepare to cross-examine the expert.[88] The Board further noted that the "real question" was whether the late submission constituted unfair surprise to Appellant.[89] In weighing the impact of the late submission, the Board found that there was no unfair surprise because Appellee's defense was

[85] *See* Industrial Accident Board Rule 9(B)(5)(d) (Dec. 12, 2011).
[86] *Conley*, 2006 WL 2997535, at *5 (citing *Haveg Industries, Inc*, 456 A.2d at 1222).
[87] *See* Board's Op., Ex. A to Notice of Appeal, Item 1, at A13-15 (July 22, 2015).
[88] *See id.* at A9-11.
[89] *Id.* at A10.

not a unique or uncommon defense and Appellant had a fair opportunity to review and comment on Dr. Stephens' report prior to her expert's testimony.[90] The Board further noted that the exclusion of Dr. Stephens' testimony would be extremely prejudicial to Appellee and in the absence of unfair surprise denied Appellant's motion.[91]

The Court is satisfied that the Board properly applied the law, weighed the impact of the late submission and determined that there was no unfair surprise to Appellant. Appellee's defense is common in the industry, Appellant had the disclosures in time for the expert's deposition, and the record reflects that Appellant rigorously cross examined Appellee's expert. The Court finds that the Board's interpretation and application of its rules was not clearly erroneous.

B. Substantial Evidence

The Board found Dr. Stephens' opinion to be more credible than Dr. Yalamanchili's opinion.[92] Dr. Stephens evaluated Appellant who reported that she had undergone a lumbar spine fusion with Dr. Yalamanchili in September of 2014.[93] Prior to examining Appellant, Dr. Stephens was provided with medical records from Dr. Uthaman (from the Delaware Pain and Spine Center), Dr. Swaminathan, Dr. Antony (from the Delaware Open MRI), Nanticoke Health Services and Rehabilitation Services, Dr. Sternberg, Dr. Sopa, Dr. Cabral, Dr. Balu, and Dr. Mehdi.[94] Dr. Stephens was also provided an operative note by Dr. Yalamanchili.[95] Based on a review of Appellant's medical records and his physical evaluation of Appellant, Dr. Stephens

[90] *Id.* at A11.
[91] *Id.*
[92] Board's Op., Ex. A to Notice of Appeal, Item 1, at A13 (July 22, 2015).
[93] Dep. of Dr. Stephens, Ex. E to Appellant's Opening Br., Item 8, at E5 (Sept. 29, 2015).
[94] *Id.*
[95] *Id.*

opined that the 2014 surgery was reasonable and necessary, but not casually related to the 2001 work accident.[96] Clearly, Dr. Stephens had sufficient information on which to base an opinion.

Dr. Stephens testified that had the 2014 surgery been causally related to the 2001 work accident, it would have occurred closer in time to the work accident and not thirteen years later.[97] Dr. Stephens further testified that there was convincing and consistent documentation of patients who had Appellant's exact spinal fusions forty years prior experienced medical conditions similar to those Appellant was experiencing.[98] Dr. Stephens opined that, as a result of her surgery in 1975, Appellant would have most likely needed the spinal fusion regardless of whether or not the work accident had occurred.[99] Dr. Stephens therefore concluded that the 2014 surgery and related treatment was reasonable and necessary to address Appellant's medical condition, but that condition was not casually related to the 2001 work accident, but was directly caused by the 1975 scoliosis surgery.[100]

Dr. Yalaminchili testified that he believed the surgery was related to the lumbar facet syndrome, lumbar radiculopathy, post-traumatic spondylolisthesis, spondylosis without myelopathy, and stenosis, which included the conditions the Board previously found Appellant suffered as a result of the work accident. However, Dr. Yalaminchili conceded that Appellant would have probably needed the surgery had the work accident not occurred because the type of surgery that Appellant had in 1975 can cause strain of adjacent discs.[101] Dr. Yalaminchili,

[96] *Id.* at E17.
[97] *Id.* at E18-19.
[98] *Id.* at E16-17.
[99] *Id.*
[100] *Id.*
[101] Dep. of Dr. Yalamanchili, Ex. D to Appellant's Opening Br., Item 8, at D31 (Sept. 29, 2015) ("So the answer is it's possible she may have required this surgery at some time in the future, probably not within the same time frame; maybe never would, I think, probably be the accurate answer.").

however, indicated that the surgery may not have been required within the same time frame, absent the work accident.[102]

In the instant matter, the Board found the testimony of one medical expert more credible than the other, based in part on Dr. Yalamanchili's testimony that Appellant probably would have needed the surgery regardless of the work accident. The Court may overturn the Board's decision about expert witness credibility only if the Court finds that the Board's credibility determination is not supported by evidence.[103] The Board did not find the surgery was related to the work injury. Appellee's medical expert said so unequivocally. Appellant's medical expert also said Appellant would have probably needed the surgery due to medical conditions apart from the work related injury.[104] There certainly was substantial evidence to support the Board's conclusion.

Appellee claims that because there is reference to Dr. Sopa's findings in Dr. Stephens testimony and the Board in its opinion, there is a violation of the doctrine of *res judicata*, collateral estoppel, or both. Appellant's argument that Dr. Stephens' testimony was "largely reliant" on Dr. Sopa's opinions is misplaced. Nowhere in Dr. Stephens' testimony does he state that he relied on Dr. Sopa's opinions, rather he stated that he reviewed Dr. Sopa's opinions, and acknowledged they were "similar" to his.[105] Dr. Stephen's testimony makes it clear that he came to an independent opinion after evaluating Appellant in person and reviewing extensive medical records.[106] While it is accurate that the Board noted that Dr. Stephens' opinion was more persuasive because it was consistent with Dr. Sopa's prior opinion, the question before the Board

[102] *Id.* at D31.
[103] *Coleman v. Dep't of Labor*, 288 A.2d 285, 287 (Del. Super. 1972).
[104] Dep. of Dr. Yalamanchili, Ex. D to Appellant's Opening Br., Item 8, at D31 (Sept. 29, 2015).
[105] *See* Dep. of Dr. Stephens, Ex. E to Appellant's Opening Br., Item 1, ay E15-16 (Sept. 29, 2015).
[106] *See id.* Dr. Stephens never indicated that he was adopting Dr. Sopa's opinion and was continuously asked if the opinions he was giving where his own. *See id.*

was not the issue regarding which the Board previously found Dr. Sopa's testimony was outweighed by contradictory medical expert testimony.[107] Rather, the issue was whether the surgery to address the conditions existing thirteen years later was causally related. The Court is satisfied that there is substantial evidence to support the Board's decision that the 2014 surgery and related treatment, although reasonable and necessary, were not causally related to the 2001 work accident.

The Board's finding was not inconsistent with, or contradictory of, the prior decision in 2006. The Board did not, in the 2015 opinion find that the Defendant's conditions, which it previously found were the result of the work injury, were not casually related to the accident. Rather, the Board found that the 2014 surgery was not related to these conditions but was, instead, necessitated by the degenerative conditions resulting from the scoliosis surgery.

There is, therefore, no violation of either doctrine alleged.

VII. CONCLUSION

The Court is satisfied that the Board's creditability determinations of the expert witnesses were supported by substantial evidence and that the Board's interpretation of Board Rule 9 was not clearly erroneous. For these reasons, the decision below is hereby **AFFIRMED**.

IT IS SO ORDERED.

____/s/_____
M. Jane Brady
Superior Court Judge

[107] The Board found Dr. Stephens' testimony to be more pressuasive because it "corresponded with the evidence and testimony more accurately." Board's Opinion, Ex, A to Notice of Appeal, Item 1, at A13 (July 22, 2015). Specifically, the Board noted that "[i]n 2003, Dr. Sopa concluded that [Appellant's] lumbar symptoms were a result of arthritic changes, which had occurred over time following her thoracolumbar spine fusion. At that time, Dr. Sopa determined that [Appellant's] 2001 work injury had not proiduced any long term problems." *Id.*